BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENDORA RUSSELL	)	
Claimant	)	
	)	
VS.	)	
	)	
BANK OF AMERICA, NA	)	
Respondent	)	Docket No. 1,012,015
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the October 31, 2003 Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

The claimant's counsel, in a letter to respondent's counsel dated September 12, 2003, made demand "for any and all video or surveillance tapes, recordings, or writings you have in your possession or have otherwise conducted on behalf of the respondent."[1]

In a letter dated September 24, 2003, respondent's counsel responded ". . . it is our policy to neither confirm or deny the existence of any video or surveillance tapes, recordings or writings, or any other work product privileged information."[2] The letter further indicated that if testimony of any investigator would be offered as evidence then any reports or supporting evidence would be provided prior to that witnesses' testimony in order to provide claimant's counsel time to prepare for cross-examination of the witness.

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[1] M.H. Trans., Cl. Ex.1.

[2] M.H. Trans., Cl. Ex. 2.

On September 26, 2003, the claimant filed a Motion to Determine which requested the Administrative Law Judge (ALJ) to determine respondent's obligation to provide the requested videotapes. The document further indicated that the hearing on the motion would be held on October 30, 2003.

At the motion hearing, claimant's counsel noted the purpose of the motion was to obtain an order directing respondent to provide any video or surveillance material before respondent deposes or takes claimant's testimony. Initially, respondent's counsel objected to the proceeding arguing there is no motion practice procedure and claimant did not otherwise file a notice of intent or application for preliminary hearing. Respondent's counsel then argued attorney work product privilege. Respondent finally argued that claimant was requesting an advisory opinion because there were no depositions or hearings scheduled.

The ALJ noted that while there is not a statutory motion practice procedure in the Workers Compensation Act, nonetheless, all the parties are routinely allowed to schedule such hearings on issues such as discovery. On October 31, 2003, the ALJ entered an Order which provided: "If the Respondent intends to take testimony from the Claimant concerning video tape of the Claimant, they are to produce the video tape ahead of time."[3]

The respondent requests review and argues the ALJ did not have jurisdiction to entertain the motion because there was no pending request to take claimant's deposition or a scheduled hearing which resulted in the ALJ issuing an advisory opinion. Respondent next argues the claimant failed to follow the procedure to set a preliminary hearing. Lastly, respondent argues it was error for the ALJ to order production of potentially qualified work product privileged materials to claimant before the claimant testified.

The claimant argues that the Board dismiss the request for review because the ALJ's Order is interlocutory and not subject to review. In the alternative, claimant argues that if a prior request is made for videotape surveillance material it must be provided. Accordingly, the claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Initially, the claimant argues the ALJ entered an interlocutory decision which is not subject to review by the Board. Accordingly, claimant requests the Board to dismiss the review.

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[3] ALJ Order (Oct. 31, 2003) at 1.

The Board must first determine whether it has jurisdiction to consider this appeal. K.S.A. 2003 Supp. 44-551(b)(1) grants the Board jurisdiction to review the following:

> All **final** orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. (Emphasis added.)

The limitation to "final" orders was not in the original, 1993, version of K.S.A. 44-551. That term was added in 1997 after the Court of Appeals had ruled that the Board's jurisdiction included the right to review such orders as an appointment of a neutral physician and held that the Board's jurisdiction was not limited to review of final orders or awards.[4] We find no subsequent appellate decision which defines "final" order in this specific context of this Board's review. The term "final" is, of course, defined as it relates to review by the Court of Appeals and this is a logical source for a definition.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The Court states three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is not effectively reviewable on appeal from a final judgement.[5]

In our view, the current Order satisfies these three criteria.[6] The Order conclusively determines whether respondent is required to produce the surveillance videotape. The Order is completely separate from the merits of the action and is not effectively reviewable on appeal after the videotape has been provided. Once the videotape is produced the damage would be done and could not be undone. There would be no effective remedy once the videotape was provided. Accordingly, the ALJ's October 31, 2003 Order is subject to review by the Board.

The respondent argues there is no case or controversy and claimant merely sought an advisory opinion regarding production of videotapes. This is not a preliminary hearing held pursuant to K.S.A. 44-534a where an injured worker is seeking benefits or where an employer is seeking relief from an existing preliminary award. Instead, this is a request from claimant seeking an order for production of surveillance videotape. Stated simply,

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[4] *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

[5] *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

[6] *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

claimant requested production of surveillance videotape and respondent refused the request. Claimant then requested that the ALJ enter an order for production of surveillance videotape. There clearly was a disputed issue in the litigation of the case and claimant sought a specific order relating to that dispute.[7] The Order issued by the ALJ resolved a controverted issue raised during the litigation of the case. Consequently, the Order was not an advisory opinion.

Respondent next argues that because there is no motion procedure set forth within the Act, the claimant should have utilized the notice procedure in the preliminary hearing statute in order to schedule the hearing before the ALJ. Because claimant did not serve a notice of intent as required by the preliminary hearing statute, respondent argues the ALJ exceeded his jurisdiction by entering an Order.

This was not a request for preliminary hearing benefits and consequently the procedural requirements for a hearing of that nature are not applicable. Moreover, respondent does not argue there was any due process defect with the notice of the motion hearing that it received.

An ALJ is frequently required to issue rulings during the ongoing piecemeal litigation of a workers compensation claim. Examples include, but are not limited to, requests for extensions of terminal dates, requests to quash depositions, requests for orders for production, requests to withdraw from representation, requests to withdraw stipulations, requests for recusal and any number of other trial issues. Motion hearings are held by the ALJ in order to resolve such litigation issues. The ALJ is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.[8] The Kansas Supreme Court has interpreted this language to mean that any procedure that is appropriate and not prohibited by the Workers Compensation Act may be used.[9] Consequently, the ALJ had the jurisdiction and the authority to entertain the claimant's motion.

Although the Workers Compensation Act does not contain formal rules of discovery, K.S.A. 44-549 (Furse 2000) provides that the Director and, by implication, the administrative law judges, have the power to compel "the production of books, accounts,

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[7] See K.S.A. 2003 Supp. 60-226.

[8] K.S.A. 2003 Supp. 44-523(a).

[9] *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 515 P.2d 735 (1973); *Drennon v. Braden Drilling Co., Inc.*, 207 Kan. 202, 483 P.2d 1022 (1971).

papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure."[10]

Generally, parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues.[11] The frequency or extent of discovery should be limited only if (1) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less expensive, or less burdensome; (2) the party seeking discovery has had ample opportunity to obtain the information sought; or (3) the burden or expense of the discovery outweighs its likely benefit, considering the amount in controversy, the needs of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues.[12]

Revelation through discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.[13]

Moreover, K.A.R. 51-3-8 provides that "the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case" prior to the first hearing. Also, see K.A.R. 51-9-10 which contains certain production requirements directed to health care providers and K.S.A. 44-5,120 (Furse 2000) which makes concealing a material fact a fraudulent and abusive act. Clearly, the Act envisions the open sharing of information in order to facilitate resolution of the claim with the minimum litigation possible.

Respondent next contends that surveillance films and materials are protected by the work product privilege and consequently are not subject to discovery. Respondent argues that if a claimant is informed of the existence of surveillance materials and views the contents before trial, claimant will tailor his testimony to reconcile any possible inconsistencies. Respondent argues allowing discovery would limit the impact of surveillance materials and would eliminate surveillance as a means to prevent overstated and fraudulent claims.

The work-product rule is codified at K.S.A. 2003 Supp. 60-226(b)(4), which in applicable part states:

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[10] See also K.S.A. 44-551(b)(1).

[11] See K.S.A. 2003 Supp. 60-226(b)(1).

[12] See K.S.A. 2003 Supp. 60-226(b)(2).

[13] *Hawkins v. Dennis*, 258 Kan. 329, 341, 905 P.2d 678 (1995).

> (4) *Trial preparation: Materials.* Subject to the provisions of subsection (b)(5), a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including such other party's attorney, consultant, surety, indemnitor, insuror or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that such party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impression, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

But the party claiming the privilege has the burden of demonstrating the existence of a privilege; the party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied; a blanket claim of privilege is insufficient to meet the burden of proof; and failure of proof causes the privilege to fail.[14]

In this instance, the respondent has made a general blanket claim of privilege while at the same time neither admitting nor denying the existence of the requested material. Because respondent failed to provide sufficient information to determine the existence of the privilege such claimed privilege must, in this instance, fail.

Finally, the Board must determine whether a surveillance videotape is subject to discovery.

The primary reason argued for allowing claimant access to surveillance materials is that modern litigation encourages sharing of all relevant material. As stated in *Hawkins*:

> The essence of discovery is a search for the truth. It is not a game but an enlightened procedure to encourage the resolution of cases based on merit and not on surprise and ambush. To that end, a party may be compelled to disclose relevant information, not privileged, within his or her knowledge or possession. Disclosure is required if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[15]

In addition, it is argued that a surveillance videotape is subject to alteration by splicing and editing and may contain distortion or misidentification in the film. Accordingly, the claimant should be allowed time to examine the evidence to determine if the events depicted are accurate.

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[14] *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, 997 P.2d 681 (2000).

[15] *Hawkins v. Dennis*, 258 Kan. 329, 341, 905 P.2d 678 (1995).

In opposition to release of surveillance material, the pragmatic viewpoint is that such materials have no probative value if claimant testifies truthfully. And claimant is aware of her physical limitations and knows what she did or did not do after the accident. Consequently, the claimant is well aware of her activities and well aware what the information sought, any surveillance material, would depict. Moreover, claimant's concern that surveillance material might exist could advance, rather than impede, the quest for the truth.[16]

It is further argued that claimant's duty to state the truth should not depend upon whether respondent has made a record of her daily activities. And if the surveillance material is released prematurely its weight is minimized because claimant can then testify in such a manner to, at a minimum, defuse any damaging events depicted.

In jurisdictions that have addressed the issue whether surveillance videotape is subject to discovery, it appears that the majority rule is that a party is entitled not only to know whether surveillance occurred but also to have pre-trial access to the surveillance material.[17] However, it is further noted that the use of surveillance can prevent fraudulent and overstated claims. Accordingly, in recognition of the use of surveillance photographs to address those legitimate concerns, many of the courts ordering discovery permit disclosure only after the party subjected to surveillance has been deposed. This preserves any inconsistencies between claimant's testimony before and after viewing the events depicted by the videotape.

In *Koser*[18], the Kansas Supreme Court ruled that the district court did not abuse its discretion by excluding surveillance videotape of an injured railroad employee in a Federal Employers' Liability Act case. The surveillance videotape depicted the plaintiff mowing grass. In a pretrial order the district court directed the parties to exchange lists of exhibits. Ruling on a motion in limine, the district court excluded the surveillance videotape from evidence because the defendant had not included it in its exhibit list. It can be argued that implicit in this decision is recognition of the fact that a surveillance videotape is subject to pretrial discovery, otherwise the failure to include it on the exhibit list would not have prevented its use at trial.

The Board concludes that the majority rule should be followed. The claimant should be provided pre-trial access to the surveillance videotape. But the Board further concludes respondent should be afforded the opportunity to "lock in" claimant's testimony regarding physical ability and activities before the surveillance videotape is disclosed.

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[16] *Ranft v. Lyons*, 163 Wis.2d 282,471 N.W.2d 254, 262 (1991).

[17] See Annot., 19 A.L.R. 4th 1236.

[18] *Koser v. Atchison, Topeka & Santa Fe Ry. Co.*, 261 Kan. 46, 928 P.2d 85 (1996).

The respondent has the option to take the discovery deposition of the claimant at any time before the case proceeds to hearing on the matter. The discovery deposition "locks in" claimant's testimony regarding her condition and activities. And subsequent surveillance videotape can still be utilized to depict ability and activities that conflict with the elicited testimony. Under this procedure, the fact that the videotape must be disclosed to claimant after it is taken does not lessen the ability to point out such discrepancies at the regular hearing nor provide the depiction to doctors who may have examined claimant or may have been provided a differing version of physical ability from claimant.

The ALJ's October 31, 2003 Order is accordingly modified to reflect claimant is entitled to discovery of the surveillance videotape but respondent may take claimant's testimony before the surveillance videotape is disclosed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated October 31, 2003, modified in accordance with the foregoing.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

DISSENT

I respectfully disagree with the majority's decision to withhold disclosure and discovery of surveillance videotapes until after a worker has testified. If one accepts that the essence of discovery is to search for the truth and that discovery is to prevent trial-by-ambush, the majority's decision merely controls when the ambush may occur.

Moreover, the majority's decision produces an interesting result when considering the Board's decision in *Finney v. Federal Express Corporation, No.* 239,009, 2000 WL 1864282 (Kan. WCAB Nov. 27, 2000). In *Finney,* the Judge entered an order refusing to compel the worker to answer questions at a deposition until the employer and its insurance carrier had produced any surveillance tapes in their possession. When the employer and its insurance carrier appealed that order, this Board held it did not have jurisdiction at that stage of the claim to review the issue as the Judge's order was interlocutory in nature. Interestingly, the majority now holds that an employer and its insurance carrier are not required to disclose or produce a surveillance tape until after the worker testifies, but the worker may refuse to answer questions until any surveillance tape is produced.

I would affirm Judge Frobish's Order that required the employer and its insurance carrier to produce any surveillance videotape before claimant testified.

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director